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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1013

DAN W. SHAFFER, *Petitioner*

v.

JOSEPH E. SEAGRAM & SONS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on October 25, 1962.

CITATION TO OPINION BELOW

The United States District Court for the Western District of Oklahoma gave judgment in favor of petitioner, on a counterclaim to an action begun by respondent, without opinion. That court's findings of fact and conclusions of law are unreported but are in the record at pp. (10-16), and are reproduced herein in Appendix A. The opinion of the United States Court of Appeals, Tenth Circuit, is reported in 310 F. 2d 688 and printed in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1962. Appendix B. Rehearing was denied on December 10, 1962. Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. When Diversity cases constitute over fifty precent of the private civil litigation and over thirty-five percent of all litigation initiated in the Federal Courts, does the Supreme Court's artificial refusal to review an equal percentage of such cases, constitute such a misuse of the "sound judicial discretion" required by Rule 19 of the Court's rules as to result in effectively denying the individual litigant "equal protection of the laws" and "due process of law?"

2. In view of the fact that the Supreme Court has, since 1940, consistently refused to review Diversity cases invoking Rule 52 of the Federal Rules of Civil Procedure, and has, for ten years, been reluctant to review cases under the *Erie* Doctrine, has not the time come to review the injustices done to the individual litigant by this prolonged abstinence?

3. Whether the "use of sound judicial discretion" requires the Supreme Court to review diversity cases where there is an obvious and prolonged conflict between the District Court and the Court of Appeals?

4. Whether the use of "sound judicial discretion" will permit a great injustice to survive, by denying certiorari, where an individual litigant is brought into a Federal Court and his rights are violated by a Court of Appeals' failure to adhere to Rule 52(a) of the

FRCP and its denial of recovery, rightfully granted under applicable state law?

5. Whether the power of supervision over Federal Courts requires the Supreme Court to correct the error of the Tenth Circuit in ignoring the District Court's findings of fact and substituting their own in clear violation of Rule 52(a), thereby failing to follow the applicable State law and the general law?

6. Whether the Supreme Court should exercise its power of supervision over Federal Courts where a Judicial Method of avoiding the long established doctrine of *Erie R. Co.* v. *Tompkins* has been clearly ascertained?

7. When the Supreme Court has determined the manner in which Rule 52 of the Federal Rules of Civil Procedure is to be applied, as it did in *United States* v. *Yellow Cab Co.*, should this Court exercise its supervisory power by hearing a fair percentage of diversity cases involving Rule 52 to enforce this mandate so that its correct application by the lower federal courts will be assured?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues in the instant case necessarily involve Article III, Amendment V of the United States Constitution (see Appendix E, p. 24a), the Oklahoma Statute of Frauds, 15 Okla. Stat. Annot., § 136, subsection 4 (see Appendix D, p. 23a), Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A. (see Appendix F, p. 25a). Also applicable to the issues herewith raised is Rule 19 of the Revised Rules of the Supreme Court of the United States (see Appendix G, p. 25a).

STATEMENT OF THE CASE

Involved in this petition are the petitioner, Dan W. Shaffer, a drilling superintendent, and respondent, Joseph E. Seagram & Sons, Inc., a subsidiary of a Canadian corporation controlled by the Bronfman family of Montreal, Canada. Joseph E. Seagram & Sons, Inc. is the successor corporation to Riceland Corporation, a Delaware Corporation. The jurisdiction of the District Court was invoked because of Diversity of Citizenship, petitioner being a citizen of Oklahoma and respondent corporation is a citizen of Indiana.

In March of 1954 the Bronfman Family owned about 99% of the outstanding common stock of the Riceland Corporation. This drilling company was then inactive, had no assets, and from its previous operations had what Respondent's President, Edgar Bronfman, described as an "overwhelming deficit," in the neighborhood of $200,000 to $300,000. Edgar Bronfman, as the authorized agent and representative of the Bronfman family, exercised complete management and control over the Riceland Corporation. Early in 1954, after deciding to reactivate Riceland Corporation, Edgar Bronfman asked M. R. Shaffer, who at that time was Vice President of Riceland Corporation, to find a suitable person to manage and revive the corporation. M. R. Shaffer talked to several people about the availability of trained individuals and decided to approach the Petitioner. At that time, Petitioner was employed as Assistant to the Drilling Superintendent for Parker Drilling Company, one of the largest drilling companies in the Southwest. He had been employed by that company for nine years. M. R. Shaffer telephoned Petitioner and proposed to employ him to operate the Rice-

land Corporation for a salary of $1,000.00 a month and a "substantial stock option." Petitioner accepted employmenet under these general terms.

On February 22, 1954, M. R. Shaffer sent a signed memorandum to Samuel and Allan Bronfman concerning Petitioner's employment, and further stated: "Dan Shaffer [Petitioner] should acquire, and I would like to "*improve*,"[1] common stock holdings in Riceland."

M. R. Shaffer at the trial testified, after Petitioner had accepted the general proposal of a "substantial" stock option, that he made a survey of other situations in order to determine what would be an equitable stock participation between the financiers and the operators of this type of business. M. R. Shaffer determined that a 30% stock option of the outstanding stock at $1.00 share to Petitioner was fair and equitable. In a "notegram" or memorandum to Edgar Bronfman, he recommended the 30% stock option. [This "Notegram" was not produced at the trial, since Respondent claimed it was not found in their files.] M. R. Shaffer further testified that Edgar Bronfman acted favorably upon the recommendation and directed M. R. Shaffer to so advise the Petitioner. (T.R. pp. 66, 70).

On May 7, 1954, about 21 days after Petitioner commenced work, he was advised by M. R. Shaffer of the 30% stock option and the Petitioner accepted. The Petitioner testified that under the oral agreement in May of 1954, he could have exercised the option the first year and that there was never anything discussed with him as to when he had to take it; accordingly, the option agreement was not, by its terms, to be exercised by Petitioner in more than a year.

[1] The Court of Appeals in their opinion erroneously indicate this word to be "approve." (See Trial Record, Exhibit 1, p. 131.)

On April 6, 1955, Edgar Bronfman, apparently most satisfied with Petitioner's services, wrote to Petitioner advising him that his salary had been increased to $17,000.00 per year and stating: "Common stock participations by yourself and Mr. Hicks are under advisement and, when the details have been examined, I should like to discuss the matter with you." (T.R., p. 132).

On June 2, 1955, E. A. Bratton, as Vice President and Treasurer of Riceland, wrote Petitioner as follows:

"Dear Dan:

Re: Shareholding Interests

"This will *confirm the shareholding participations* in the *outstanding* common stock of Riceland Corporation for yourself and Orville W. Hicks as follows:

Dan W. Shaffer	5%	4,242 shares
Orville W. Hicks	2%	1,696 shares
Other shareholders	93%	78,900 shares
	100%	84,838 shares

"The cost of the shares will be $1.00 a share, with terms of payment to be arranged.

"It is also understood that the 799 shares owned by Mr. M. R. Shaffer will form part of your common stock participation and that Mr. M. R. Shaffer will be reimbursed $799.00 representing his cost.

"A directors' meeting will be required to formally confirm your stock participation. I suggest, however, that this meeting be deferred for the time being." (T.R., p. 132).

Since this letter did not designate the full 30% stock option, Petitioner telephoned E. A. Bratton. Petitioner had also seen that this stock option appeared to be partly from unissued stock although it was stated

to be from "outstanding common stock." Bratton said he would "have to check with Edgar" and would then advise.

On June 6, 1955, Bratton wrote Petitioner as follows:

> "Dear Dan:
>
> "Attached is copy of letter to Ray [M. R. Shaffer] in connection with the purchase by you of his 799 shares of Riceland.
>
> ". . . There is one point, Dan—if you wish to defer purchase until you get your *full participation* or, for personal reasons you do not wish to take down the shares now, an alternative method would be *for Richland to redeem the shares* they would then be included in *your total participation when issued later.*
>
> "Whichever way you decide is satisfactory to the other directors, Dan, but you might let me know what you decide." (T.R., pp. 133-134).

Petitioner testified that in December 1955, he attended a "budget meeting" in New York, N. Y. He saw the written agenda that had been prepared by M. R. Shaffer, proposing that Petitioner's stock participation be consummated, but was asked by Edgar Bronfman to defer any discussion on the subject and "gave his word" that the participation would be worked out. (T.R., p. 103).

In the Fall of 1956, Edgar Bronfman then received a recommendation from one Carroll Bennett (who did not testify) that he discontinue drilling operations and so wrote the Petitioner, saying he did not "want to be placed in the position of having to pull the rug from under you, should we decide to liquidate the Corporation." This was November 1, 1956. The Cor-

portation, however, kept on drilling because they could not find a market for the drilling equipment.

On January 2, 1957, Petitioner, backed by financing from the First National Bank of Tulsa, made a written offer to acquire Riceland Corporation. As part of the consideration for the purchase, Petitioner wrote that he would "relinquish to present owners any considerations due them from stock participation plan or any other commitments due." No response ensued until January 21, 1957, when one Harry Mack, a person affiliated with Frankfort Oil Company (another subsidiary corporation owned by the Bronfmans), came to Petitioner and informed him that if he could not better his offer of purchase, he was there to "take over." The following morning Mack came again and asked if Petitioner could "better his offer" and Petitioner orally attempted to exercise his stock option. That afternoon, Petitioner was summarily removed as President of Riceland Corporation. Criticism of Petitioner was then expressed for the first time; the stated reason for discharge was "because of his lack of ability properly to perform the duties of such office."

On February 6 and 14, 1957, Petitioner sent two letters to Edgar Bronfman attempting to exercise his 30% stock option. Edgar Bronfman denied that Petitioner ever had a "stock option agreement."

Early in Petitioner's employment, specifically, December 1, 1954, the Riceland Corporation, advanced Petitioner $10,000.00 to buy a home, evidenced by a later promissory note dated September 26, 1956. On June 7, 1957, Riceland Corporation demanded payment of this note. Petitioner answered by again attempting to exercise his stock option, seeking either the stock

"or its equivalent cash value" and stating he was willing to let the unpaid balance of the note apply. This case was commenced by Respondent's action to recover the balance due on this note. The Petitioner counterclaimed for damages. It was determined at trial that the stock in question was valued at 79c per share on a June 30, 1955 valuation and the value had increased to $3.27 per share as of the time of the breach of contract by the Respondent.

DISPOSITION OF THE DISTRICT COURT

This case was tried without a jury in the United States District Court for the Western District of Oklahoma. After hearing all the evidence, Judge Chandler decided in favor of Defendant and awarded Defendant a judgment on his counterclaim in the amount of $57,771.50. He made findings of fact and conclusions of law in support of his judgment. (Appendix A)

THE DISPOSITION IN THE COURT OF APPEALS

The Respondent appealed from the District Court's judgment to the United States Court of Appeals for the Tenth Circuit. In an opinion by Judge Delmas C. Hill, of Wichita, Kansas, the Court of Appeals reversed the trial court and remanded with directions to enter judgment in favor of Respondent without any determination that essential findings of Judge Chandler's were "clearly erroneous." Petitioner sought a rehearing but this was denied. (Appendix C)

REASONS FOR GRANTING THE WRIT

This Petition should be granted in order to:

1. Protect and defend the Fifth Amendment rights of the individual litigant to "equal protection of the laws" and to "due process of law" in Federal cases arising from diversity of citizenship, especially since this Court in recent years has been reluctant to review diversity cases.

2. Re-instruct and supervise the Federal Courts, particularly the United States Courts of Appeal, on the proper meaning and application of the Judicial Dictrine of *Erie R. Co.* v. *Tompkins*, especially since this Court, by a reluctance to review cases involving its application, has permitted the lower Federal Courts to adopt a Judicial Method of avoiding that doctrine.

3. Re-instruct and supervise the United States Courts of Appeal on the proper meaning and application of Rule 52 of the Federal Rules of Civil Procedure, as determined by this Court in *United States* v. *Yellow Cab Co.*, and to enforce its correct application by those courts, especially since this Court has refused to review such applications in cases arising under diversity of citizenship.

ARGUMENT

POINT I

Under Article III of the United States Constitution This Court Has No Authority to Establish a Blanket Exclusionary Rule Under Which It Denies Certiorari in Practically Every Diversity Case Decided By the United States Courts of Appeal.

Point II of this Petition establishes that defendant Seagram's, a large corporation has "reneged" on its contract to reward Petitioner for his efforts in making a failing corporation financially successful.

This manifest injustice is a result of a decision of the Court of Appeals for the Tenth Circuit, which reversed an experienced Oklahoma District Judge and made new findings of fact in violation of Rule 52 of the Federal Rules of Civil Procedure.

Petitioner, a small individual, should have his civil rights protected by this Court from injustice as equally as the rights of individuals in criminal cases are presently protected.

This Court as created under Article III is the juridical head of this nation in *Diversity* as well as *Federal Question* cases.

Yet, since the decision in *Erie* v. *Tompkins*, 304 U.S. 64 (1938), this Court has been denying certiorari in almost all *Diversity* cases. In so doing, this Court does the greatest injustice to the litigants.

In confining itself to reviewing constitutional issues or points involving the interpretation of federal statutes, this Court fails to follow the constitutional mandate of the Fifth Amendments. Such mandate dictates that this Court review a proportionately greater number of *Diversity* cases under the present

practice. This Court almost always denies certiorari in a *Diversity* case.

The time has now come to brief and argue the wisdom and constitutional propriety of such a blanket exclusion of *Diversity* cases from review.

Not since 1940, has this Court reviewed a *Diversity* case in which error in the application of Rule 52 by a Court of Appeals was alleged.

Yet every year there are an increasing number of *Diversity* cases tried in federal courts. While in the fiscal year 1961-1962, *Diversity* cases constituted over 50% of all federal civil litigation and over 35% of all types of federal litigation, during the 1961 Term, the Supreme Court granted certiorari in *only* four *Diversity* cases.

To persist in leaving to the Circuits review of all such litigation is a national tradgedy. It means that this Court is denying its wisdom and guidance in supervising the work that most lawyers and courts are doing.

Here under *Erie* v. *Tompkins*, *supra*, the District Court and the Tenth Circuit were obligated to apply Oklahoma law.

In attaining a result in any litigation, there are two variables: the facts and the law. In federal courts, under the *Erie* Doctrine, the law (of the State) must be treated as a constant, i.e. the Federal Judge cannot change the state's interpretation of it; he can only decide on its application to the facts before him. Consequently, the only way that the result may be varied is for the facts, as the sole remaining variable, to be altered.

Under Rule 52 of the Federal Rules of Civil Procedure, it is the function of the District Court sitting without a jury to find the facts, and these "[f]indings of fact shall not be set aside *unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." [Emphasis added].

When, after an extensive hearing of the evidence, certain express findings of fact are made by the District Court, the Court of Appeals ought not be permitted to change the result of the case by altering the District Court's findings of fact and substituting their own. This clearly violates the *spirit* of the *Erie* Doctrine and should only be permitted when Rule 52 is *strictly* adhered to.

In the instant case, the Tenth Circuit Court of Appeals was clearly *in error* in violating Rule 52 by completely disregarding the *essential* findings of fact by the District Court. Thus, in order to remain within the limits of the *letter* of the *Erie* Doctrine, by applying Oklahoma law to a given set of facts, and to arrive at the result they desired, the Tenth Circuit Court of Appeals altered the facts in violation of Rule 52. While keeping strictly within the *letter* of *Erie* decision, they grossly violated the *spirit* of that decision. Such a judicial method of avoiding this Court's clear mandate must not be permitted.

The importance of supervising this procedural mandate lies not only in its consequences, but even more so in the fact that it is a law which was promulgated under the judicial power of this Court.

Normally a law enacted by a legislature is continually subject to close scrutiny and re-evaluation by sub-

sequent sessions of that legislature. It is re-interpreted and modified at frequent periodic intervals to insure that it will remain applicable to the needs of a rapidly changing modern society. One of the most important qualities of a good law (be it either a statute enacted by a legislature or a decision rendered by a court)—or, for that matter, a good legal system—is flexibility. In order to insure that what is presently a good law will remain so in the future, its flexibility must be preserved by providing for its constant scrutiny by its formulators.

For a good law to be effective, it must be correctly applied. What may be a good law in theory or on paper may become a bad or undesirable law where its application does not conform to the intent of its formulators. Such faulty or incorrect application is usually due to a misunderstanding of the law's purpose by the courts charged with administering it. In order to provide that such a law will be correctly applied, supervision of its application by its formulators is necessary. Such supervision by a legislature is exercised by its power to repeal or modify the law in order to clarify that law's purpose and application.

Such supervision by a court is exercised in its powers of interpretation and supervision of inferior courts to clarify that law and to instruct the inferior courts on its purpose and application. Inaction by the formulators leads to confusion rather than clarity.

However, judicial supervision must not solely be limited to ruling on the application and purpose of a law. The Court must exercise its supervisory power to enforce its ruling and to guarantee the correct application of that law. Constant supervision is absolutely essential to the protection of good law.

Since the start of the October 1953 Term, the *Erie* Doctrine has been examined in *only* 13 cases. In chronological order of interpretation, they are: a.) non-diversity: *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 408 (1953), *Wilburn Boat Co.* v. *Fireman's Insurance Co.*, 348 U.S. 310 (1955), *Leiter Minerals, Inc.* v. *U. S.*, 352 U.S. 220 (1957), *Commissioner of Internal Revenue* v. *Stern*, 357 U.S. 39 (1958), and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959); b) diversity: *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), *Smith* v. *Sperling*, 354 U.S. 91 (1957), *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), *Dick* v. *N.Y. Life Insurance Co.*, 359 U.S. 437 (1959), *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959), *Nolan* v. *Transocean Air Lines*, 365 U.S. 293 (1961), and *The Glidden Co.* v. *Flanok*, 370 U.S. 530, (1962). Thus in 10 years, this Court has heard only 13 *Erie* cases, and only 7 of those cases arose under *Diversity*.

The last time that this Court has extensively examined the *Erie* case was five years ago in *Byrd* v. *Blue Ridge Rural Electric Cooperative*, *supra*. It is a most important dictate of "sound judicial discretion" which requires this Court, particularly in the light of recent judicial history, to once again consider the *Erie* Doctrine and either re-affirm, modify or overrule it.

As previously stated, this Court has not reviewed the application of Rule 52 by a Circuit in a *Diversity* case since 1940.

The time has come when the Court should consider whether a blanket rule under which it refuses to review most *Diversity* cases is resulting in manifest injustice.

This is particularly true when, as here, the Court of Appeals reverses a District Court on findings of fact, permitting a large corporation to "renege" on its bargain with a small individual.

"The Judiciary Act of 1789 . . . established a system of federal trial courts throughout the United States and vested them with jurisdiction of controversies 'by a citizen of the state in which the suit is brought against a citizen of another state.'" [Justice Robt. H. Jackson, *The Supreme Court as a Law Court*, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 33 (1955).]

Article III, section 2 of the Constitution of the United States specifically provided that "[i]n all other Cases before mentioned [which include *Diversity* cases], the Supreme Court shall have *appellate jurisdiction*, both as to *Law* and *Fact* . . . ." [Emphasis added]. Congress, utilizing its power to make "exceptions" and "regulations" of the Supreme Court's jurisdiction, has implemented Article III, Section 2, by providing that *Diversity* cases may be reviewed by this Court on writ of certiorari, 28 U.S.C. 1254(1).

While this Court has determined in Supreme Court Rule 19 that such review "is not a matter of right" on the part of the litigant, this Court has imposed upon itself the *duty* of using "sound judicial discretion" in exercising its *right* to review such cases.

Both the Original Colonies which adopted the Constitution and the Congress which enacted 28 U.S.C. 1254(1) expressly granted this Court jurisdiction in reviewing *Diversity* cases. Nowhere in either the Constitution or the laws enacted by Congress is there any implication that such power to review is not or should

not be exercised in a given area. By implication, this Court has the power to refuse to review cases, but such *refusal* must be tempered with *sound judicial discretion*. Arbitrariness is the antithesis of discretion.

This Court in exercising its jurisdiction in certain cases, while based on a desire to utilize this Court's time to its best advantage and to reduce the volume of cases which this Court will review in order to make a more adequate adjudication of the cases which it actually does decide, has in recent years been quite reluctant to review any case, regardless of its merits, in certain "fields" of the law.

One of these areas is pointed out by the late Justice Robert H. Jackson: "A litigant's chance to reach the Supreme Court on the question of whether state law is misapplied, though promised by the Court's rules, is zero." (Jackson, *op. cit. supra*, at 37). This is reaffirmed by Mr. Justice Brennan in *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, reported in 80 S. Ct. 16 (1959), where he points out that ordinarily an application by a District Court of the Rules of Civil Procedure, which is affirmed by a Court of Appeals will not be reviewed by this Court.

However, in the instant case the error in refusing to apply Rule 52 was made by the Court of Appeals *alone*, and most importantly that refusal resulted in completely disregarding "the judgment of the District Judge in relation to a particular set of facts" (80 S. Ct. at 18).

The result of arbitrarily circumscribing certain areas of the law and refusing review of the cases which fall within those areas, is to formulate an "exclusionary rule" which prevents the lowly litigant from redressing the injury to him by the error of law or fact com-

mitted by a lower federal court. Thus, whether a litigant's final plea for justice in his case is to be reviewed by this Court depends more on the fact that a federal statute is involved than on the merits of the petitioner's case. Such method of review, regardless of the soundness of the reasons therefore, appears to be arbitrary.

While the granting of the writ of certiorari "is not a matter of right," the arbitrary refusal to grant the writ would seem to be a violation of the litigant's right to an "equal protection of the laws" as encompased by the "due process" clause of the Fifth Amendment. At least, if not such a violation of a litigant's right, then it is a neglect of "sound judicial discretion" in the granting of certiorari and of the *duty* which is imposed on this Court by Rule 19 of its own Rules and by Article III of the Constitution.

This can best be summed up by referring to the words of the Honorable Thurman Arnold, in which he defended this Court's reviewing of a case which involved a determination of fact. While his words are in reference to jury verdicts under the Federal Employers Liability Act, and in particular to the case of *Rodgers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957), they have a much broader meaning and envelop the entire scope of judicial review. (*Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960) at 1301-1302).

> "I had not thought that the discretionary power to refuse certiorari permitted the Supreme Court to abandon any area of its jurisdiction and refuse to look at particular cases not on the merits but on the theory that the whole area was forbidden by judicial fiat. . . .
>
> When, therefore, the Supreme Court reviews a . . . case in order to compel co rts of appeals to

> respect jury verdicts, the Justices are doing far more than merely deciding an isolated evidentiary fact. They are laying down a principal vital to the security of lowly litigants. Access to the Supreme Court by the lowliest citizen . . . is tremendously significant. . . .
>
> To say that it is a waste of the Court's time to provide such precedents is to show a callous disregard of the rights of injured persons. If such cases are not to be reviewed it should be Congress and not the Court that should say so."

What Thurman Arnold said about the duty of this Court to review reversals by Courts of Appeal in F.E.L.A. and Jones Act cases applies equally to review here, where the Tenth Circuit in an opinion written by a Kansas Judge and lawyer reverses an experienced Oklahoma Judge and lawyer, not on the law or the facts but by finding new facts in violation of Rule 52.

Nor is this the first time the Tenth Circuit has done this (see *Frankfort Oil Co. v. Snakard*, 279 F. 2d 436 (1960), *cert. denied.*, a case involving this same defendant).

The time has come when this Court must speak on the proper application of Rule 52 by Courts of Appeals in *Diversity* cases.

POINT II

The Court of Appeals for the Tenth Circuit Clearly Violated Rule 52 of the Federal Rules of Civil Procedure as Interpreted By the United States Supreme Court in United States v. Yellow Cab Co., 338 U.S. 338, and Thereby Circumvented the Oklahoma Supreme Court Determination That Performance of Services in Consideration for an Oral Option to Buy Corporate Stock Is "Part Payment" and Is Not Within the Statute of Frauds.

Rule 52(a), Federal Rules of Civil Procedure, provides, in part, as follows:

"Findings of fact shall not be set aside unless *clearly erroneous* and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses."

The scope of appellate review under the mandate of Rule 52(a) is set out by *Mr. Justice Jackson* in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150; at 341, 342:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendant's witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt, and concluded that they bear a different meaning from that for which the Government contends."

> "It ought to be unnecessary to say Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this court for what virtually amounts to a trial de novo on the record of such findings as intent, motive, and design. While, of course, it would be our duty to correct clear error, even in findings

> of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

This doctrinal construction of Rule 52 of the Federal Rules of Civil Procedure has been followed in many cases both in the Supreme Court and the Circuit Court of Appeal. See, for example, *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007; *Cleo Syrup Corporation* v. *Coca-Cola Company*, 139 F. 2d 416 (8th Cir. 1943); *Nee* v. *Linwood Securities Company*, 174 F. 2d 434 (9th Cir. 1949). Petitioner contends that the Court of Appeals of the Tenth Circuit clearly violated this mandate of the Supreme Court by failing to recognize essential findings of fact by the trial court.

The existence of an oral agreement between the Petitioner and Respondent for a 30% stock option at $1.00 per share, is not at issue in this appeal. The Court of Appeals readily admits that such a contract existed. However, it held that such an agreement was unforceable within the Statute of Frauds.

The sole question in this case is one of fact, namely, was there an oral agreement that accepted services would be received as part payment for stock which became worth more than one dollar a share? In Finding of Fact #9 (Appendix A), the trial court found that the services rendered by the Petitioner were of such a unique and highly successful nature that they were the prime consideration for the stock option.

The right of the Trial Court to find as a matter of fact that services were of such a nature as to render them the prime consideration for the oral agreement, is in no way contested by the Court of Appeals.

Further, in an action to enforce a contract to bequeath personal property, as distinguished from real estate, an appellate court cannot say as a matter of law that the services rendered to and accepted by the Testatrix, mother of the plaintiff, were solely attributable to filial loyalty or concern for the mother; *Scott v. Grinell*, 102 N.H. 490, 161 A 2d 179, at 182-3. That question was one for the trier of the facts. The action was for breach of contract. The bar of the Statute of Frauds was removed by "payment."

In the case at bar the Court of Appeals made no determination as to this issue of fact but merely held that no such finding was made. After finding as a fact that such services were the primary consideration for the stock option, the trial court applied the proper Oklahoma Law, which states that performance of services is considered "part payment" under the Statute of Frauds of the State of Oklahoma (15 O.S. 1961, § 136, sub-section 4). This exception to the bar to enforceability is well established in Oklahoma Law. In *Hays Drilling Co. v. Sartain*, 108 Okla. 181, 235 Pac. 615, the Supreme Court of Oklahoma held as follows at 616:

> "The performance by the Plaintiff was in the nature of services fully rendered and benefits fully received by defendant, rather than money paid. We think the position of the plaintiff is, as a matter of law, the same as if he had paid to the defendant so much money for the stock. . . ."

In 2 Corbin, *Contracts*, § 495, the author states that services that are the full equivalent of a salary *and* of a promise to sell an interest in a business should make the owner's oral promise enforceable, even though it was not expressed to be a part of the price of the interest. In Section 495 he approves *Hightower* v. *Ansley*, 126 Ga. 8, 54 S.E. 939, holding that the agreed price may consist of services instead of money or goods, and that rendition of the services constitutes payment. The *Hightower* case involved an action for damages for refusal to deliver corporate stock after plaintiff gave up a lucrative position and entered the service of the corporation at a fixed salary. Professor Williston is in accord; the statute puts no limit on the way that the price shall be paid; 2 Williston, *Contracts*, 2d Ed. § 565.

The Missouri Court cited and followed Corbin in *Osborn* v. *Chandeysson Electric Co.*, 248 S.W. 2d 657 (1952). The facts are remarkably similar to the case at bar. The Corporation and its stockholder were one and the same; it was completely dominated by him. The employee gave up a job and performed services held to be part payment for the agreement to transfer stock to him. When he went to work, it was agreed only that he would get a "substantial" amount of stock. Nineteen months later the amount orally was made definite. The employee's testimony about the oral contract was verified by his father. But the stockholder's denial of these statements was corroborated by two of his officers. The employee was discharged, then demanded his stock, and brought suit. The court held that the jury was justified in finding that although the initial agreement was too indefinite, it was later made clear and enforceable. The court on page 662 states:

"... The contract according to Plaintiff, was that he was to come to work for defendant and receive the same salary the Ralston Company was paying him and a substantial interest in defendant company. Plaintiff thereupon entered upon the performance of his obligation by giving up his position with the Ralston Company and working for defendant. Plaintiff's performance of services constituted a good consideration and was the payment agreed upon for the stock according to plaintiff. *Vogeler* v. *Punch*, 205 Mo. 558, 103 S.W. 1001, 1005; *Ostrander* v. *Messmer*, 315 Mo. 1165, 289 S.W. 609, 613. Under plaintiff's view of the evidence, it was a jury question whether there had been performance by plaintiff and a recognition by defendant of such performance as entitled plaintiff to the stock. *Lorenz* v. *Morney*, 221 Mo. App. 409, 282 S.W. 59, 61. The Statute does not preclude a recovery."

Based on the evidence presented at the trial and taking into consideration the foregoing authority on the subject, the trial court made the correct determination of fact.

It does not necessarily follow, as the Court of Appeals contends, that since the trial court found as a fact (Finding of Fact #4), that Petitioner did not have an enforceable option until the 30% became definite, that the services rendered were not the primary consideration for the stock option. When read in connection with other findings of fact, it is apparent that the trial court was merely saying that prior to the option becoming definite at 30%, the Petitioner had no enforceable contract. Regardless of whether or not the "30%" stock option existed on the day Petitioner commenced work, his services were rendered for salary plus a "substantial" stock option. Petitioner's dili-

gence and initiative resulted in the performance of highly successful and unique services, increasing the value of the stock in question from 79c to $3.27 per share.

In the case of *Buice* v. *Scruggs Equipment Co.*, 194 Tenn. 129, 250 S.W. 2d 44, which concerned an oral option to a corporation's vice president to buy stock, the court, when confronted with the objection that the Plaintiff's salary was payment in full for his services, stated as follows at 47, 48:

> "... It is argued that nothing has been done, no part performance, as to the transfer of the stock to the appellant by the appellees and that this—the transfer of the stock and giving the notes therefor—was and is the contract which is sought to be enforced. In our judgment reading the averments of the bill, and making a very thorough study of the contract as alleged, we think that the transfer of this stock and the giving of the notes therefor was only a part of the contract as a whole and that the principal reason for making the offer to thus transfer this stock to the appellant was not the giving of the notes and paying for the stock as alleged *but for the things that he did for the appellees to get this stock for that price.*"
>
> "... The acts of the appellant relied on as partial performance had been done by him in pursuance to the averred contract and agreement and are clearly referable thereto."

Therefore, the Trial Court was justified in finding that the *services* rendered were the prime consideration of the 30c stock option agreement regardless of whether or not it is to be treated as part of the initial employment contract.

POINT III

The Court of Appeals for the Tenth Circuit Failed to Comply With the Spirit of the Statute of Frauds as Determined By the Supreme Court of Oklahoma, in Permitting the Statute of Frauds to be Used as a Shield Against the Enforcement of a Valid Oral Contract.

As the Court of Appeals points out in citing *Wells* v. *Shriver*, 81 Okl. 108, 197 P. 460, the Oklahoma statute of Frauds "was enacted for the purpose of preventing fraud and not for the purpose of promoting frauds or aiding a person in the perpetration of frauds." In the *Wells* case, the Supreme Court rebuked an individual who was attempting to invoke the Statute of Frauds. The Oklahoma Court wanted to restrict the use of the Statute of Frauds, so as not to permit a person to use this as a shield to the enforcement of a contract. Petitioner is in agreement with the Court of Appeals, that since no allegation of fraud was made by the Petitioner, the trial court could not find fraud, *as such*, on the part of Edgar Bronfman.

However, the trial court, rather than finding fraud, *as such*, merely, wanted to emphasize the doctrine handed down by the Oklahoma Court in *Wells* v. *Shriver supra*. From the testimony, or rather the lack of testimony on behalf of the Respondent, the trial court was justified in concluding that the Respondent was using the Statute of Frauds as a means to bar the enforcement of a valid oral contract. The trial court realized that to hold otherwise would be a great injustice to a man who worked so diligently in order to change a failing corporation into a growing and prosperous one.

The Court of Appeals by reversing the judgment of the trial court has caused a great injustice. The only

wrong committed by Petitioner was his trust in the word of his employer. The vast majority of jurisdictions including the State of Oklahoma have come to realize that the strict enforcement of the Statute of Frauds will lead to unwarranted injustices. For this reason, many exceptions to the prohibitions of the Statute of Frauds have been created. Included in these exceptions are performance of services as part payment in an oral contract (*Hays Drilling Co.* v. *Sartain, supra*).

When the bulk of the evidence presented in the trial court involves the sworn testimony of witnesses, as it does in cases involving the Statute of Frauds, a great deal of weight must be given the trial court's determination of the witnesses credibility. The trial judge, himself, and he alone, hears the testimony on the witness stand. The Respondent did not attempt to present witnesses to refute the testimony of the Petitioner's witnesses but merely contends that the oral agreement is unenforceable under the Statute of Frauds. By this mere technicality, the Petitioner is being deprived of property which is rightfully his. The Court of Appeals, by their decision, sanctioned the conduct of Respondent. Such conduct being a highly unethical breach of the duty that an employer owes an employee.

CONCLUSION

1. The Court of Appeals of the Tenth Circuit clearly violated Rule 52 of the Federal Rules of Civil Procedure as interpreted by the U. S. Supreme Court.

2. The Court of Appeals of the Tenth Circuit failed to apply the proper Oklahoma Law to the findings of fact in the case.

3. The Court of Appeals of the Tenth Circuit failed to comply with the *spirit* of the Statute of Frauds as determined by the Supreme Court of Oklahoma.

4. The Supreme Court should grant certiorari because this is a *Diversity* case, in which the Court of Appeals not only violated Rule 52, but also violated the *spirit* of the Judicial Doctrine of *Eric R. Co.* v. *Tompkins.*

For these reasons, Petitioner respectfully prays that this petition for certiorari be granted.

Respectfully submitted,

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